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No. 9990

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF FORSYTH, a municipal corporation of the State of Montana, and FAIRBANKS, MORSE & COMPANY, a corporation,

Appellants,

vs.

MOUNTAIN STATES POWER COMPANY, a corporation,

Appellee.

REPLY BRIEF.

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JURISDICTION.

On page 11 of appellee's brief the appellee, after citing *Johnson v. City of Pittsburgh*, 106 F. 753, to the effect that the appellants' objections to the jurisdiction in that case are based upon the assumption that:

> "The object or purpose of this action is to prevent the city from becoming a competitor of appellee and that the value of the matter in controversy is the loss which appellee would suffer from such competition"

the appellee herein says:

> "This argument completely overlooks the fact that the main purpose of appellee is to protect its franchise

and property by judicial determination that it has a valid franchise and a right to maintain and operate its electric plant or system."

Nowhere is it alleged what the value of this franchise is, assuming appellee has one, nor what the value of the right to maintain and operate its electric plant or system is, if these were the criteria of jurisdiction, which we deny.

We have examined the cases cited by appellee on the question of jurisdiction (4-12), and find that these cases have no applicability to the case at bar. They relate to entirely different facts and situations. They are mostly old cases—some of them taxpayers' actions—and have to a large extent been impliedly overruled or discredited. Compare them with the numerous, recent, pertinent cases cited by the appellants on pages 11 to 16 of their brief.

Among the cases cited by appellee is *Mississippi & Missouri Railroad Co. v. Ward*, 67 U. S. 485, 17 L. Ed. 311, concerning which, and other cases not specifically mentioned, Judge Lumpkin, in an elaborate and well considered opinion, in *Purcell v. Sommers*, 34 F. Supp. 421, says:

"In injunction proceedings and in proceedings of a mixed nature similar to this proceeding, it becomes necessary to determine whether the required jurisdictional amount in controversy is present, but certain well established principles have now become imbedded in our law which must be followed in seeking the answer to that question, and these established principles are two in number. *First, the right which the plaintiff seeks to protect is the matter in controversy. Second, the right which it is sought to protect must be a right of property, and it must be such that it has a value which can be proved and calculated in the ordinary mode of a business transaction.*

"The Courts have reached that determination only through laborious process, *and in effect they have had to overrule certain earlier cases, and particularly what is frequently spoken of as the leading case of Mississippi & M. R. Co. v. Ward,* 2 Black 485, 492, 17 L. Ed. 311. In that case a bill was filed praying for an abatement of a bridge across the Mississippi River, averring it to be a public nuisance especially injurious to the plaintiff as an owner and navigator of steamboats. The Court, through Justice Catron, gave expression to the following frequently quoted sentence with which it disposed of the question of jurisdiction, 'but the want of a sufficient amount of damage having been sustained to give the Federal Courts jurisdiction, will not defeat the remedy as the removal of the obstruction is the matter in controversy, and the value of the object must govern'. Thus the Court did not give effect to what Judge Dobie, in his very excellent book on Federal Procedure, terms, 'The Plaintiff View-Point Rule'. See Dobie on Federal Procedure, page 133, et seq. From the plaintiff's view-point the right which he was seeking to establish was the right to navigate the river unencumbered by the obstruction, and that was the right in controversy.

"It is believed that subsequent and more recent decisions have, however, established the principle that the matter in dispute is the right the plaintiff seeks to protect."

The right which the appellee seeks to protect in this case is the claimed right to be free of competition by the City, but it has no such right.

AS TO THE FRANCHISE.

On page 12 appellee says:

> "It follows from this concession that if appellee has a franchise it cannot be 'ousted', or in other words, required to remove its poles and wires from the streets, and therefore the other questions presented in the brief for appellants are immaterial, and the judgment of the District Court must be affirmed."

First, as to the use of the word "concession", we do not think we have made any concession when we merely stated what is plainly set out in the specifications. These specifications (11-12) provide that if there be any litigation questioning the validity of the contract, "the contractor shall not be required to proceed with the performance thereof until such litigation is finally determined in favor of the owner". Second, there is a jurisdictional bridge to cross before the Court can determine if appellee has a franchise. If this Court should hold that the District Court was without jurisdiction, then it follows that it has no jurisdiction to determine the merits and must order the dismissal of the bill of complaint. Of course the mere ownership of a non-inclusive franchise does not prevent the City from installing its own plant.

Appellee cites the case of *Butte v. Montana Independent Telephone Co.,* 50 Mont. 574, 148 Pac. 384, as authority for the claim that the powers reserved to city and town councils in Section 6645 of the Montana Statutes are only police powers. We do not think that case determines the question at issue here. The case was one where the City of Butte had passed an ordinance requiring all corpora-

tions maintaining wires within the city for the transmission of electricity to place their wires under ground. The constitution of the State (Article 15, Section 14) gave telegraph and telephone companies the right to construct and maintain lines within the State and connect the same with other lines. In pursuance of the constitutional right accorded to telephone companies the legislature passed an act providing that such companies could construct their lines upon the public roads and highways of Montana without exception. (Section 1000, Civic Code of Montana, 1895.) Subsequently, in 1905 the legislature amended Section 1000 to include electric light and electric power corporations, but provided that the act should not apply to public roads and highways within the limits of incorporated cities or towns. The Supreme Court held (State, ex rel Crumb v. City of Helena, 34 Mont. 67) that in so far as the Act of 1905 failed to meet the requirements of the constitution, it was invalid. Thereafter the act was further amended by providing that nothing contained therein should be construed as to restrict the powers of city or town councils. Notwithstanding the constitutional and statutory grant, the Court held that the city had power to regulate and so to order the telephone wires under ground. In the telephone case all the powers the city could have, in view of the telephone company's right to occupy the streets, were powers to regulate. As respects electric light and power companies, the powers of the city were in no wise so restricted. These powers are set out on pages 51 and 52 of appellants' brief.

Appellee contends on page 28 of the brief that the powers of the city with respect to electric light and power

companies are mere police powers and claims that a franchise is not granted in the exercise of the police power. Whether you call the power to regulate a police power or not, it has been held in *Owensboro v. Cumberland T. & T. Co.,* 230 U. S. 58, 38 S. Ct. 988, that,

> "Authority of a municipality 'to regulate the streets and alleys' gives a power in Connecticut to grant a franchise to a telephone company to place and maintain its poles and wires upon the city streets."

Mr. Justice Brewer in *St. Louis v. Western Union Telegraph Co.,* 149 U. S. 465, 469, says that power to regulate includes the power to grant franchises, saying:

> "Charter power 'to regulate the use of streets' is very comprehensive. The word 'regulate' is one of broad import. It may be likened to the comprehensive power conferred upon the Congress by the Federal Constitution relating to Foreign and Interstate Commerce. The Federal Courts have always held this power to be broad and comprehensive."

And, in *State v. Murphy,* 134 Mo. 548, 562, 31 S. W. 784, 34 L. R. A. 369, 56 Am. St. 515, the Court said:

> "Under its general powers to regulate the use of streets, the city has authority to authorize corporations and persons for the purpose of serving the public to string telegraph, telephone or electric light wires upon poles above the surface or through conduits beneath the surface of the streets, provided such structures and mechanical appliances do not materially interfere with the ordinary use of the streets, and public travel thereon."

See generally McQuillin, Municipal Corporations, Section 1750, 2d. Ed.

As pointed out in our main brief, there is no repealing clause in Section 6645, and consequently the powers of cities and towns remain intact and in full force and effect. We think the various acts passed by the legislature manifest a policy to protect cities and towns in Montana from being invaded by electric light or power line corporations without permission of the local authorities. When the original act relating to telephone companies was amended in 1905 to include electric light and power companies, or persons owning or operating such, it contained the provision that the act shall not apply to public roads and highways within the limits of incorporated cities or towns, and when the act was further amended as Section 6645, containing the provision that, "Nothing herein shall be so construed as to restrict the powers of city or town councils", the legislature further manifested a policy to reserve to the local authorities the power of controlling their streets as respects their use by electric light and power companies.

> "Constitutional provisions or statutes prohibiting the use of the streets of a municipality without the consent of a municipality are to be construed as if they expressly authorized the municipality to grant the use of its streets to such companies." McQuillin, Municipal Corporations, Section 1750.

It cannot reasonably be concluded, in the absence of a clear declaration on the subject, that the legislature would commit such an act of folly or be so oblivious to public rights as to place the cities and towns of Montana at the

free use of electric light and power line companies, and, in the absence of such declaration, the consent of the municipality to the occupation of its streets must be obtained, and in the manner prescribed by the municipal law.

AS TO THE CLAIMED RIGHT OF APPELLEE TO CHALLENGE VALIDITY OF CONTRACT.

Under this heading the appellee cites the cases of *City of Campbell v. Arkansas-Missouri Power Company,* 55 F. (2d) 560, and *Arkansas-Missouri Power Company v. City of Kennett,* 78 F. (2d) 911. We think those cases, even if they had any general recognition as authority, have been overruled by the long list of recent cases cited by us under the general heading of "Summary of Points and Authorities", subdivisions (c), (d) and (e), and by the quotations from said authorities on pages 24 to 29 of our main brief.

It is difficult to see how any jurisdictional amount was involved in the Campbell and Arkansas-Missouri Power Company cases inasmuch as there was no exclusive franchise and they could show no damages. It is not enough for the plaintiffs in those cases to show that there was some technical violation of their claimed rights, but there should be a showing, in order to give the Federal Court jurisdiction, that the matter in controversy exceeded $3,000 in value.

The case of *Frost v. Corporation Commission,* 278 U. S. 515, 49 S. Ct. 235 was considered by the Court in the case of *Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U. S. 118, 83 L. Ed. 543 and was not considered applicable. *Tennessee Electric Power Co. v. Tennessee*

Valley Authority is on all fours with the case at bar. In the *Tennessee Valley Authority* case it was claimed that the act under which the Tennessee Valley Authority operated was unconstitutional, and that its acts were *ultra vires.* In the case at bar the appellee is claiming that the city is acting *ultra vires* in attempting to establish a municipal light plant, and in the method of financing it. In the cases cited in our brief the Courts have held that where a company is operating under a non-exclusive franchise, no legal or equitable right is violated, and that it has no standing to maintain the action. It cannot show any legal damages, and, therefore, in the Federal Courts cannot bring itself within their jurisdiction. The only basis upon which the *Frost* case can be reconciled with the case of *Tennessee Valley Authority v. Ickes* and other cases is by considering the Frost case as one where the right or franchise was exclusive as against anyone who had not obtained a permit.

APPELLEE HAS NO RIGHT TO MAINTAIN THIS ACTION AS A TAXPAYER.

Appellee has no right to maintain this action as a taxpayer for the following reasons:

(1) The action is not brought in a representative capacity, that is to say, it is not brought for the benefit of the appellee as a taxpayer, and of all other taxpayers (16).

(2) Causes of action in different capacities cannot be united in the same complaint. The appellee cannot join in one action its claims of a private nature and claims to vindicate public rights of taxpayers.

(3) The allegation that appellee is a taxpayer is denied.

(4) There is no allegation in the complaint as to how a taxpayer is damaged, or to what extent, by the action of the city; that is to say, there is no allegation of a jurisdictional amount with respect to a taxpayer's action.

(5) The contract in question is not payable out of taxes, but solely out of the revenues to be derived from the operation of the lighting plant to be installed; so no taxpayer is affected.

(6) There is no finding that appellee is a taxpayer.

THE CONTRACT IS NOT VOID FOR WANT OF MUTUALITY.

We think this point has been adequately met in our brief in chief. The appellants are held to the performance of their contract if the litigation as to the rights of the appellee in the streets of the city is determined in favor of the city. This is a contract on condition. If the contract is void as the appellee claims, it is not damaged in the amount of $3,000 or any amount.

THE CLAIM THAT THE CITY OF FORSYTH IS WITHOUT AUTHORITY TO MAKE THE CONTRACT IN QUESTION.

The decisions on this question have been thoroughly canvassed on both sides in the briefs already furnished. We contend that the weight of authority is to the effect that the city has a right to make this contract.

The decisions in favor of the validity of the contract are re-inforced by a very recent decision (January 5, 1942) of the Supreme Court of the State of Delaware in the case of *Town of Seaford v. Eastern Shore Public Service Company, et al.* This case has not yet been published but will be soon published in the next issue of the advanced sheets of the Second Atlantic Monthly. We have obtained an advance copy of the decision. In that case part of the syllabus is as follows:

> "Under the charter of the Town of Seaford authorizing the council to borrow money and issue bonds or certificates of indebtedness to provide funds for the erection, extension, enlargement or repair of any electric power plant, the method of acquisition of a plant as thus set out is not exclusive on question of validity of purchase of plant under a contract providing that purchase price should be paid only out of revenues derived from operation of plant and distribution system. 29 Del. Laws, C. 153, Sec. 32, as amended by 39 Del. Laws, 2d Sp. Sess., C. 25, Sec. 4."

In the decision an act entitled "An Act Authorizing the council of the town of Seaford to borrow money and issue bonds to secure the payment thereof for the purpose of providing electric lights for the Town of Seaford" was considered. This act is almost identical with the Montana Statute 5039.63. The Delaware Court, with respect to the act of that State, says:

> "We shall pause but slightly to consider this act. The town did not borrow money and did not issue bonds pursuant to the act, and to that extent the quoted act has no bearing on the present question. *We think, however, that the quoted act is a plain legislative recognition of the power of the town to own and*

operate an electric light plant for public lighting and of furnishing light for private use."

Another act amending the charter of the Town of Seaford provided:

> "The council may borrow money and issue bonds or certificates of indebtedness to secure the payment thereof on the faith and credit of the Town of Seaford to provide funds for the erection * * * of any plant * * * for the supply or the manufacture and distribution of electricity or gas for light, heat or power purposes * * *"

The act provides for the approval of the electors for the borrowing of any money, and points out in meticulous detail the steps that must be taken to obtain the approval of the electors. The Court then stated that *the act was a clear legislative recognition of the right of the town to have an electric light plant.* The defendant in that case contended that the town had no power to acquire the light plant in any other manner than that set out in the last above referred to act. With respect to which, the Court said:

> "It is our opinion that the method of acquisition of an electric plant as set out in the charter is not an exclusive method."

THE AUTHORITY OF CHAPTER 115, LAWS OF 1937, AS AMENDED BY CHAPTER 111 OF THE LAWS OF 1939.

By Section 10, Chapter 111, Laws of 1939, the authority conferred by the above act, as amended, does not expire until March 15, 1941, and it provides that any projects

undertaken prior to that date may be completed thereunder. The project in question was undertaken in April, 1940.

This act, as amended, authorizes the construction of any other projects of any character eligible for loans under the provisions of the act of Congress known as "Emergency Relief and Reconstruction Act of 1932", known also as "The National Industrial Recovery Act", and any other acts amendatory of or supplemental to such acts. The act also authorizes city councils to contract for the construction of any project to be paid for solely from the earnings of such a project, and without liability on the part of the governmental subdivision or agency contracting for the construction of the same. Sec. 3, "Emergency Relief and Reconstruction Act of 1932" provides for making loans or contracts with municipalities and financing projects authorized under Federal, State or municipal law, *which are self-liquidating in character.* Section 201, "Emergency Relief and Reconstruction Act of 1932", volume 47 U. S. Statutes at Large, page 709. "The National and Industrial Recovery Act (Chapter 90, page 195, Volume 48 of the United States Statutes at Large) provides for a program of public works. It includes the construction, repair and improvement of public highways and parks, wharves, public buildings *and any publicly owned instrumentalities and facilities.* A municipal light and power plant payable out of its own earnings is a self-liquidating proposition and is a publicly owned instrumentality and facility. Numerous electrc light plants have been erected by municipalities which were partially financed under these acts.

Chapter 115, Laws of 1937, does, therefore, provide for the construction of public lighting plants. The Statute, (Chapter 115) provides:

> "This act shall not repeal any statute now in force or prevent the exercise of powers as elsewhere in the statutes of this State provided. It shall constitute an additional method of carrying out the powers herein authorized."

For the reasons in this and in our main brief assigned, we respectfully submit that the decision of the District Court is erroneous, should be reversed, and the case dismissed.

Respectfully submitted,

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